BB Zh

BEFORE THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA

* * * * * * * * *

IN THE MATTER OF THE APPLICATION)

FOR*EXTENSION OF TIME ON)

BENEFICIAL WATER USE PERMIT)

NOS:**27941-s40A AND 50642-s40A)

BY ZINNE BROTHERS)

FINAL ORDER

* * * * * * * * *

On May 18, 1988, a Proposal for Decision for Application for Extension of Time for Beneficial Water Use Permit No. 27941-s40A and a Proposal for Decision for Application for Extension of Time for Beneficial Water Use Permit No. 50642-s40A were entered. Both Proposals recommended that the respective Applications for Extension of Time be denied. Applicant Alvin W. Zinne for Zinne Brothers filed Exceptions to both Proposals for Decision and requested an oral argument be held on each pursuant to Mont. Code Ann. § 2-4-621(1). An oral argument hearing was held before the Assistant Administrator of the Water Resources Division on August 23, 1988, at Harlowton, Montana. Present at the hearing were Alvin W. Zinne for the Permittee Zinne Brothers and Rueben C. Pitsch, Objector. This Final Order will address both Proposals for Decision and the Exceptions filed for each as they contain substantially the same issues.

In reviewing the Proposals for Decision in this matter, the Administrative Procedure Act provides that the Findings of Fact of the Hearings Examiner cannot be modified unless:

CASE # 50642

The agency first determines from a review of the complete record . . . that the findings were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

The Examiner's findings can only be reversed if they are clearly erroneous. See generally, Billings v. Billings Firefighters
Local No. 521, 200 Mont. 421 (1982).

In order to obtain an extension of the time limit specified in a permit for commencement of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use, a permittee must show the Department of Natural Resources and Conservation (Department or DNRC) good cause why an extension should be given. Mont. Code Ann. § 85-2-312(3).

In this matter, the Permittee requests an Extension of Time on the basis that he was unable to perfect his permit due to factors beyond his control. Specifically, Permittee claims that because of low flow years and misappropriation by other users there has not been water of sufficient quantity or quality to justify commencement or completion of the permitted development. Permittee also contends that uncertainty created by the ongoing adjudication is sufficient good cause to grant the requested Extension of Time.

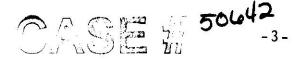
After review of the entire record, including the Proposals for Decision, the Exceptions filed to the Proposals, and the Oral Argument on the Exceptions, I hereby accept and adopt the Proposal for Decision in each case.



The Exceptions filed by Mr. Zinne raised the issue of sufficiency of flow of adequate quality in Big Coulee Creek to justify commencement or completion of the appropriation under Permits No. 27941-s40A or 50642-s40A since their issuance. These issues had been raised in the initial hearing herein and were addressed by the Hearings Examiner in the Proposal for Decision for each permit. Proposals for Decision, Finding of Fact No. 8. Permittee alleges in his Exceptions to the Proposals for Decision that DNRC gave more weight to the testimony of the Objectors and the DNRC Water Rights Specialist without any actual proof of flow measurements or water quality, during periods they contend water was available in sufficient quantity and quality.

In reviewing the record, testimony was given by Mr. Pitsch and Mr. Shifley that adequate quantities of water were available during periods after the permits were issued for the Permittee to appropriate water. Proposal for Decision, Finding of Fact No. 8. Mr. Zinne points out in his Exceptions that Mr. Pitsch did not have 30 years experience irrigating from Big Coulee Creek, but first began irrigating from Big Coulee Creek in 1976. Mr. Pitsch agreed at the oral argument that he has had 30 years experience in irrigation but not necessarily from Big Coulee Creek. The record of the hearing does indicate that Mr. Pitsch's 30 years of experience were not all on Big Coulee Creek. Such a minor error would not change the weight given to Mr. Pitsch's testimony, and does not lead to an erroneous decision.

Mr. Pitsch's and Mr. Shifley's testimony was corroborated by Mr. Schmidt of the DNRC Water Rights Field Office in Lewistown.



Mr. Schmidt was on the Creek concerning a different matter and observed that Big Coulee Creek was flowing full. Mr. Schmidt was not requested to take flow measurements. Mr. Zinne contends that this testimony is insufficient to show water was available. However, testimony from experienced ranchers who also irrigate out of the source of supply and a Department specialist in the water resources field is competent substantial credible evidence on which the Hearing Examiner reasonably based her findings when Zinne Brothers themselves offered no flow records.

In addition to natural causes, the Permittee contends that there is an inadequate quantity of water due to misappropriation of water on Big Coulee Creek by junior appropriators. Mr. Zinne asserts that complaints of misappropriation are on record with the DNRC. Therefore, there was not a sufficient quantity of water available to warrant development of the project, and an Extension of Time should be granted.

Montana water use is governed by the law of prior appropriation - first in time is first in right. A permit issued by the DNRC allows the permittee to proceed with the appropriation of water and to take their place on the ladder of priorities. The permittee is entitled to seek enforcement of the priority system. The Hearings Examiner was correct in concluding that simply to say that the priority scheme had not been enforced in the past is not good cause to grant an Extension of Time. Proposals for Decision, Conclusion of Law No. 4. Lack of enforcement is not a factor beyond the Permittee's control.



Permittee also contends that insufficient water was available because water in the creek was of such poor quality that it could not be used. See Proposals for Decision, Finding of Fact No. 9. Permittee asserts that the Objectors produced no water sample to show that water was of sufficient quality to use for irrigation. Mr. Zinne stated in oral argument that the Department of Health and Environmental Sciences has done a water sampling of Big Coulee Creek that DNRC should have used in making a determination on water quality. Mr. Zinne also stated that there is land within one-half mile of the proposed place of use that is very saline and producing very little grain, some of which will grow only adaptable grass and no alfalfa.

It is incumbent on the Permittee to show good cause for an Extension of Time. Evidence must be submitted at the hearing stage. No new evidence or testimony can be considered at the oral argument stage of these proceedings. Mont. Admin. R. 36.12.229(2)(a). Evidence which was not introduced at the hearing or brought to the Hearing Examiner's attention at a meaningful time cannot be considered. New evidence on surrounding areas and water quality reports is not considered here.

The record reflects that when the water is low Big Coulee
Creek has water quality problems. However, Mr. Pitsch and Mr.
Shifley testified that water of sufficient quality for irrigation
was available after the permits were issued. Both are
experienced irrigators and irrigate for themselves out of Big
Coulee Creek. There is substantial credible evidence on the
record to support the Hearings Examiner's findings.



Finally, the Permittee contends that resolution of the ongoing adjudication is necessary in order to develop due to the substantial cost of installing the irrigation system. See Proposals for Decision, Finding of Fact No. 10; Conclusion of Law No. 4. Mr. Zinne asserts that upstream claims need to be settled in order to justify development because if these claims are upheld as filed there will be no water available.

As the Proposal for Decision correctly points out:

There is always a risk in installing a water system and attempting to perfect a water right. If adequate water was always available for all uses, a priority system would not be needed. It is up to each individual appropriator to decide if the risk is worth the investment of time and money he will have to make. he proceeds to complete his project with reasonable diligence, investing his time and money, he is entitled to reap the benefits of his efforts by retaining his Permit and its priority. If he is unwilling to proceed toward perfection of his Permit, then an appropriator must "step out" of the line of priorities, and return when and if he feels secure in proceeding with the proposed project. To allow an appropriator to do otherwise -- that is, to retain a priority date for some possible future development which may or may not occur--penalizes other water users and potential water users who would be willing to take the risk and develop the water for immediate beneficial use.

Proposal for Decision, Permit No. 27941-s40A, pgs. 10-11.

The Hearing Examiner properly weighed the testimony and evidence presented in this matter. There is substantial and credible evidence to support each of the Hearing Examiner's Findings and Conclusions. An engineering study done in 1984 (prior to issuance of the permit), without more, does not establish due diligence. Permittee did not prove that they were unable to perfect the permit due to factors beyond their control. And the fact that the adjudication is ongoing does not

constitute good cause for granting an Extension of Time.

Good cause was not shown for an Extension of Time for completion of the appropriation under Permits No. 27941-s40A and 50642-s40A, therefore, the Applications for Extension of Time for these permits were properly denied. Mont. Code Ann. § 85-2-312. All the Findings of Fact and Conclusions of Law contained in the Proposals for Decision for Permit Nos. 27941-s40A and 50642-s40A are incorporated in this Final Order by reference. Based upon the Findings and Conclusions, all files and records herein, and the Exceptions filed and the oral argument hearing, the Department of Natural Resources and Conservation makes the following:

ORDER

Applications for Extension of Time on Beneficial Water Use Permit Nos. 27941-s40A and 50642-s40A issued to Zinne Brothers are denied.

NOTICE

The Department's Final Order may be appealed in accordance with Mont. Code Ann. § 2-4-702 of the Montana Administrative Procedure Act by filing a petition in the appropriate court within thirty (30) days after service of this Final Order.

DONE this 12 day of December, 1988.

Laurence Siroky
Assistant Administrator
Department of Natural
Resources and Conservation

1520 East Sixth Ave. Helena, Montana 59620 (406) 444-6816

DA 3 50642

-7-

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 125 day of December, 1988, as follows:

Zinne Brothers c/o Alvin W. Zinne 501 Big Coulee Road Ryegate, Montana 59074

Richard I. Shifley Route 1 Ryegate, Montana 59074

Faye Bergan
Legal Counsel
Department of Natural
Resources and Conservation
1520 East Sixth Avenue
Helena, Montana 59620-2301

Reuben and LaVone Pitsch Ryegate, Montana 59074

Sol Lovas Felt and Martin, P.C. P.O. Box 2558 Billings, Montana 59103-2558

Sam Rodriguez Lewistown Field Manager P.O. Box 438 Lewistown, Montana 59457

Peggy Elting, Hearing Examiner Department of Natural Resources and Conservation 1520 East Sixth Avenue Helena, Montana 59620-2301

> Irene V. LaBare Legal Secretary

BEFORE THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA

* * * * * * * * * *

IN THE MATTER OF THE APPLICATION)
FOR EXTENSION OF TIME ON BENEFICIAL)
WATER USE PERMIT NO. 50642-s40A)
GRANTED TO ZINNE BROS.)

PROPOSAL FOR DECISION

* * * * * * * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on April 22, 1988 in Harlowton, Montana.

Permittee Zinne Brothers appeared at the hearing through Alvin Zinne.

Objector Reuben Pitsch appeared at the hearing in person.

Objector Richard Shifley appeared at the hearing in person.

Sylvio Rodriguez, Field Manager of the Lewistown Water Rights Bureau Field Office, and David Schmidt, Water Rights Specialist with the same office, attended the hearing in this matter.

EXHIBITS

No exhibits were offered for inclusion in the record in this matter.

The Department file on the Application for Extension, which contains the originals of the Application and the Objections, photocopies of the Permit and of the Notice of Action on Application for Extension of Time, correspondence between the Department and the parties, and Department processing documents,



was made available at the hearing for review by all parties. No party made objection to any part of the file. Therefore, the Department file in this matter is included in the record in its entirety.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

- 1. MCA §85-2-312(3) (1987) states, in relevant part: The department may, upon a showing of good cause, extend time limits specified in the permit for commencement of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use. All requests for extensions of time must be by affidavit and must be filed with the department prior to the expiration of the time limit specified in the permit or any previously authorized extension of time. department may issue an order temporarily extending the time limit specified in the permit for 120 days or until the department has completed its action under this section, whichever is greater. receipt of a proper request for extension of time, the department shall prepare a notice containing the facts pertinent to the request for extension of time and shall publish the notice in a newspaper of general circulation in the area of the source. department may serve notice by first-class mail upon any public agency or other person the department determines may be interested in or affected by the request for extension of time. The department shall hold a hearing on the request for extension of time on its own motion or if requested by an interested party.
- 2. On May 17, 1985, Provisional Permit to Appropriate Water Use Permit No. 50642-s40A was issued to Zinne Bros., with a

priority date of April 14, 1982. The Permit granted the Permittees the right to divert 720 gallons per minute ("gpm") up to 90.00 acre-feet of water per year for new flood irrigation of 60 acres located in the SE% of Section 18, Township 5 North, Range 20 East, Golden Valley County, Montana.

Under the terms of Permit No. 50642-s40A, the Permittees were required to have completed the permitted diversion and distribution works, and applied water to beneficial use as specified in the Permit, on or before December 1, 1987. The Permittees further were required to file the Notice of Completion for their project on or before the same date, December 1, 1987.

3. On November 25, 1987, the Department of Natural Resources and Conservation (hereafter, the "Department") received an Application for Extension of Time for Permit No. 50642-s40A, requesting that the date of completion for the project authorized by the Permit be extended until June 30, 1990.

The reason given by the Permittees for requesting an extension was that there had not been stream flow of adequate quantity and quality since the Permit was issued to allow the Permittees to divert pursuant to their Permit. The Permittees further stated that "Equipment will be installed whenever there is a promising assurance in our opinion that there will be adequate flow for a season."

In response to question No. 3 on the Application, which requests the Permittees to "describe what work has already been initiated toward perfecting the water right", the Permittees answered that "no engineering has been done for Permit #50642-40A."

- 4. On November 30, 1987, the Department issued a Notice of Action on Application for Extension of Time, temporarily extending the time limit specified in Permit No. 50642-s40A for an additional 120 days, "or until the Department has completed its action on the request under Section 85-2-312, MCA, whichever is greater", in accordance with §85-2-312(3) (1987).
- 5. The pertinent portions of the Application were published in the Roundup Record Tribune, a newspaper of general circulation in the area of the source, on January 6, 1988.

 Additionally, the Department served notice by first-class mail on public agencies and individuals which the Department determined might be interested in or affected by the request for extension of time. (See File.)
- 6. The Department received timely objections to the Permittees' Application for Extension of Time from Reuben Pitsch and Richard Shifley. Mr. Pitsch requested that the Department hold a hearing in this matter. Therefore, pursuant to the provisions of MCA §85-2-312(3) (1987), the Department held a hearing on the Application.
- 7. Permittee Alvin Zinne testified that the Permittees have not purchased a diversion system, installed any diversion works, or appropriated water pursuant to Permit No. 50642-s40A. He



stated that the Permittees have not had an estimate made of the materials and expense involved in installing a wheel line to irrigate 40 acres, which he stated the Permittees would install instead of the flood irrigation of 60 acres for which the Permit was issued, since such an estimate would be a repetition of the estimate which they obtained for Permit No. 27941-s40A. (See File on Permit No. 27941-s40A.)

8. Permittee Zinne testified that, in his judgment, there has not been sufficient flow, of adequate quality, in Big Coulee Creek to warrant utilizing Permit No. 50642-s40A since its issuance.

Mr. Zinne's judgment of insufficient flow and quality was excepted to by Objectors Reuben Pitsch and Richard Shifley. In their testimony on Application for Extension of Time on Permit No. 27941-s40A, the hearing for which was held immediately prior to the hearing in this matter, and the testimony in which was stipulated to apply to the present matter as well, the Objectors contradicted Mr. Zinne's statements.

Reuben Pitsch testified that he has had more than 30 years experience in irrigating out of Big Coulee Creek, and that he is able to judge water availability in the creek by sight.

Mr. Pitsch testified that, based on his long experience with Big Coulee Creek, there is a water availability problem on the creek at certain times; however, that there have been periods of time since the Permittees' Permit was granted when there was "ample

All parties to this matter agreed that the record in this matter would include the testimony and evidence presented during the hearing on Application for Extension of Time on Beneficial Water Use Permit No. 27941-s40A issued to the Permittees.



water" to meet senior diversion requirements and allow the Permittees to appropriate. He cited the months of June and July, 1987 as one of the time periods when the Permittees could have diverted without affecting anyone.

Mr. Shifley confirmed Mr. Pitsch's testimony that there had been sufficient water in June and July of 1987 to allow the Permittees to appropriate. He stated that there was a good flow of water even as far as three or four miles downstream of the Permittees, which is where Mr. Shifley is located. Mr. Shifley stated that he has thirty years experience on Big Coulee Creek, and that in his estimate, there have been times in the years since the Permit was granted when there has been plenty of water in the creek if the Permittees wanted to appropriate.

David Schmidt of the Lewistown Water Rights Bureau Field Office, was not called upon to testify during the hearing in this matter. However, based upon his testimony at the previous hearing, Big Coulee Creek had a full channel of flow, two to three feet deep, as of the time of his June 9, 1987 Field Investigation. (See In the Matter of the Application for Extension of Time on Beneficial Water Use Permit No. 27941-540A, Finding of Fact 8.)

9. On the question of water quality, the Permittee stated that the quality of water is poor when the creek flow is low, and that he would not irrigate.

Mr. Pitsch responded that people have used it during these times and their land is still producing. Mr. Shifley stated that there are times when the water is of good quality as well



as sufficient quantity. (Testimony given at the hearing In the Matter of the Application for Extension of Time on Beneficial Water Use Permit No. 27941-s40A.)

10. The Permittee alleged that there has been a 10-year history of misappropriation upstream, which has had a bearing on the fact that the Applicants have not utilized their Permit. He stated that there are times, due to weekends or other (unspecified) reasons, when there is a delay in enforcement of the priority system. When questioned as to whether he would ever feel comfortable in developing the Permit, Mr. Zinne replied that it would depend on the outcome of the adjudication process.

Mr. Zinne testified that the main reason that the Permittees have not put a diversion system "on line" is due to the ongoing adjudication. He testified that, if the rights claimed on Big Coulee Creek are approved, there will not be any water available for appropriation. He stated that the Permittees are unwilling to make the investment necessary to install an irrigation system until they know the outcome of the adjudication process, since there will be no sense in installing a wheel line if the claimed rights on Big Coulee Creek are approved.

When asked what the Permittees would do if they were granted their requested extension until June 1990 and the Final Decree had not been issued by then, Mr. Zinne stated that they would "sit on" the Permit (request further extensions) until the adjudication has been completed. Once the adjudication is complete, they would have a water right to use if the claims are



not approved, and would install a diversion system whenever there was water available for a season's appropriation. (See Application.) (Testimony given at the hearing In the Matter of the Application for Extension of Time on Permit No. 27941-s40A.)

11. The Objectors allege that the Permittees have not proceeded with due diligence to complete their project and perfect their water right.

Reuben Pitsch testified that he has permits junior to the Permit in this matter, which he has developed. These permits would be subject to being called by the Permittee if they begin appropriating water pursuant to their Permits. He stated that the Permittees have had adequate time and water available to them to develop the Permit if they had attempted to do so, but that no effort has been made to complete their proposed project. Mr. Pitsch stated, pursuant to his written objection, that the Permittees'- actions (or lack thereof) are contrary to the purposes of the water permit system, "which is to grant rights only for present actual use." (See Objection.)

Richard Shifley stated that he believes the Permittees have had plenty of time to put in their proposed system. He stated that he does not believe there are any problems such as financial difficulties that have kept the Permittees from developing their project, and that there have been times since the Permit was granted when there was enough water of good quality that the Permittees could have diverted if they had



wanted to do so. (Testimony given at the hearing In the Matter of the Application for Extension of Time on Permit No. 27941-s40A.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

- 1. The Department has jurisdiction over the subject matter herein, and all the parties hereto.
- 2. The Department gave proper notice of the hearing, and all relative substantive and procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner. (See Findings of Fact 1, 4, 5, and 6.)
- 3. The holder of a Beneficial Water Use Permit is required to make a showing of good cause why the Permit time limits should be extended before the Department can extend time limits specified in the Permit for commencement of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use. See MCA §85-2-312(3) (1987).
- 4. The Permittees have not proceeded with due diligence to develop the appropriation right granted to them in Permit No. 50642-s40A.

The Permittees have not invested in any irrigation equipment or even commenced construction of the diversion works, let alone put their water right to beneficial use. Rather, testimony by



Alvin Zinne clearly indicates that the Permittees do not have a present bona fide intent to put water to beneficial use, but are attempting to reserve water for possible future use, and retain the priority date which has been granted.

Under the Montana Water Use Act, the only entities which are entitled to reserve water for future use are the federal government, the state, or political subdivisions or agencies.

See MCA §85-2-316. All other persons or entities are only entitled to the priority date of the permit issued to them, if they have proceeded to perfect the permit with "reasonable diligence."

Montana case law is replete with cases in which the courts have required an appropriator to show that he has diligently pursued perfection of his water right, before the right is granted a priority date as of the time the appropriation was initiated. Under pre-1973 water law, courts have granted a priority date as of the date of initiating the appropriation only on that portion of the water right which was completed with reasonable diligence. See 79 Ranch, Inc. v. Pitsch, 204 Mont. 426 (1983); Montana Department of Natural Resources and Conservation v. Intake Water Company, 171 Mont. 416 (1976); Holmstrom Land Co. v. Newlan Creek Water District, 185 Mont. 409 (1979).

The Montana Water Use Act has incorporated the requirement for proceeding with due diligence. A Permittee is entitled to a priority date as of the filing of his application (see MCA §85-2-401(2)); however, the appropriator is entitled to retain

his priority date only if the terms of the permit are met. These terms include the time limits for "commencement of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use." MCA \$85-2-312(2). The Montana Water Use Act clearly contemplates that the result of not meeting the time limits shall be loss or modification of the permit and its attendant priority date. See MCA \$85-2-314.

The Permittees have not shown by a preponderance of the evidence in the record that they have been unable to perfect their Permit due to physical factors beyond their control. The record indicates that water has been available for appropriation in Big Coulee Creek during at least some periods when the Permittees could have appropriated. (See Finding of Fact 8.) However, the Permittees have made no attempt to commence or complete their appropriation works, so that they would be able to divert water at such times as it might be available, nor does the testimony show that they intend to construct and utilize the proposed appropriation works within the requested extension of time, should they be granted such an extension. See Findings of Fact 3, 10.

In the present matter, the Permittees have not made any attempt to begin the project for which they wish to retain the present Permit. The main basis for their failure to act, according to the Permittee's testimony, is that they do not wish to risk investing any money in a project they may or may not be able to utilize in the future, depending upon the outcome of the

present adjudication, and whether the Permittees judge that "there is a promising assurance" that there will be adequate flow for a season. (See Application for Extension of Time.)

However, this is not a sufficient basis for granting an extension of time which, by the Permittee's own admission, will not be used to even begin the project unless the adjudication is complete and the Permittees feel they will be assured of obtaining their full appropriation right.

There is always a risk in installing a water system and attempting to perfect a water right. If adequate water was always available for all uses, a priority system would not be needed. It is up to each individual appropriator to decide if the risk is worth the investment of time and money he will have to make. If he proceeds to complete his project with reasonable diligence, investing his time and money, he is entitled to reap the benefits of his efforts by retaining his Permit and its priority. If he is unwilling to proceed toward perfection of his Permit, then an appropriator must "step out" of the line of priorities, and return when and if he feels secure in proceeding with the proposed project. To allow an appropriator to do otherwise--that is, to retain a priority date for some possible future development which may or may not occur--penalizes other water users and potential water users who would be willing to take the risk and develop the water for immediate beneficial use.

There is nothing in the statutory law or case law of Montana to support the idea that a Permittee should be allowed to retain a water right for which no work has been done, as against junior



water users and potential water users. Such a holding would allow a Permittee to delegate the risks to other water users so that he may later reap the possible rewards of having obtained a Permit for which he himself has taken no risk and done no work.

See generally, In the Matter of the Proposed Revocation of Beneficial Water Use Permit No. 4516g-410 (Crumpled Horn), October 15, 1987 Final Order.

In the present matter, not only have the Permittees not proceeded with due diligence, but there is no assurance that they ever will proceed with their proposed project. To allow them to retain their priority date would contravene the intent, as well as the statutory requirements, of the Water Use Act.

6. The Permittees have not shown good cause why an Extension of Time should be granted on Beneficial Water Use Permit No. 50642-s40A.

WHEREFORE, based upon the proposed Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Application for Extension of Time on Beneficial Water Use Permit No. 50642-s40A issued to the Zinne Bros. is denied.

NOTICE

This proposal is a recommendation, not a final decision.

All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party



adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620-2301); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA §2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. MCA §2-4-621(1). Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present



in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

DONE this $18^{\frac{11}{12}}$ day of $\frac{\text{May}}{1}$, 1988.

Peggy A/ Elting, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6612

50642

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing PROPOSAL FOR DECISION (Case No. P 50642-s40A) was served by mail upon all parties of record at their address or addresses this 100 day of May, 1988 as follows:

Zinne Brothers % Alvin W. Zinne 501 Big Coulee Rd. Ryegate, MT 59074

Reuben & LaVone Pitsch Ryegate, MT 59074

Richard I. Shifley Route 1 Ryegate, MT 59074

Sam Rodriguez Lewistown Field Manager PO Box 438 Lewistown, MT 59457 (inter-departmental mail)

Sally Martinez

CASE

50642

BEFORE THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA

* * * * * * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
FINAL ORDER
NO. 50642-s40A BY ZINNE BROS.)

* * * * * * * *

The time period for filing exceptions or objections to the Proposal for Decision (hereafter "Proposal") of September 18, 1984, has expired. Harry Van Der Voort filed an exception, as did Sterling Sundheim, Engineer, Lewistown Area Field Office, Water Rights Bureau, Department of Natural Resources and Conservation (hereafter "Department" or "DNRC").

The Proposal contains some errors of law, as well as omits some necessary conclusions of law. The Department, having reviewed the complete record, and based thereon, has herein added the necessary conclusions and corrected the erroneous conclusions. Except as rejected or modified below, the Findings of Fact and Conclusions of Law of the Proposal are hereby adopted as part of the Final Order, and incorporated by reference herein.

1. Amount of Beneficial Use.

The record herein clearly indicates that the water applied for is duplicative of a Statement of Claim of Existing Right (hereafter "SB76 Claim") Claim Number 3882. Finding of Fact 2 states, "The land in question is not currently irrigated and

CASE # 50642

apparently has not been irrigated for many years. The applicants claim a filed appropriation dating from 1910 that covers this same land but they are unsure of its validity.".

This finding is not supported by competent substantial evidence as the evidence in the record indicates that the SB76 Claim 3882-40A is a claimed right with a priority date of September 13, 1909. Hearing Exhibit 3, p. 3 states, "The area that he intends to irrigate matches the area claimed as irrigated on existing water right claim W-3882 which has a priority date of September 13, 1909." Further, a search of the Department records indicates that while the Applicant did not claim the priority date on the standard claim form, in accordance with the instructions on the form, attached thereto was a copy of a recorded notice of claim of water right which claimed the September 13, 1909 date.

While this error is not material to the disposition herein, it is corrected for purposes of clarification. The priority date of a water right is often its most valuable characteristic, and should be carefully described. Montana Department of Natural Resources and Conservation v. Intake Water Co. 171 Mont. 416, 558 P.2d 1110 (1976)

Further, should the claimed right ultimately be determined valid, the amount of water which could, as a matter of law, be applied to a beneficial use on the appurtenant property, would be reduced pro tanto. That is, the beneficial use being the measure of the right, if the right to irrigate the tract in question exists by virtue of the existing right, the permit use would not

be beneficial, as there is an upper limit upon the amount of water which can beneficially be applied to irrigation. Worden v. Alexander, 108 Mont 208, 90 P.2d 160 (1939); In the Matter of the Application for Beneficial Water Use Permit No. 50240-s40J and 50241-s40J by Larry and Phyllis Simpson, Final Order, October 31, 1984. Therefore, a permit condition has been incorporated into the Permit, so that the amount of water right arising under the permit is reduced pro tanto if and when the duplicative statement of claim is determined to be valid.

2. Musselshell Conditions

The Department requested certain conditions be attached to the permit, to afford protection to its prior existing rights. The proposed conditions are listed on page 3 of the Proposal. Following the listing of the requisite minimum flow conditions, the finding includes the statement, "The present application must be conditioned upon not taking water when the appropriator is aware or has been informed that the Musselshell River flow drops below the indicated level." Proposal, p. 3.

The numerical flows included in the <u>proposed permit</u> are, however, somewhat less than those listed in the Findings of Fact. The submission from Sterling Sundheim, DNRC Lewistown Area Water Rights Bureau Field Office confirms that the flows included in the proposed permit should be modified, i.e.: the flows included in the proposed permit should be the same as those included in Finding of Fact Number 7, on p. 3, Proposal. The

permit issued is modified accordingly below. The flows included in the proposed permit are simply not supported by competent substantial evidence in the record. (See, Proposal p. 3; Objection to Application filed by the Department, with minimum flow "Musselshell Conditions" attached.)

Exceptions of Objector Harry Van Der Voort

Mr. Van Der Voort objected to the Proposal's lack of a finding or conclusion, ". . . that specifically establishes the volume of water in Big Coulee Creek that must be allowed to flow by applicants' diversion in order to satisfy prior appropriators downstream."

The Order as issued will protect the senior appropriators as best it can be done. The appropriative system necessarily envisions stream administration, as the "first in time, first in right" would obviously never be invoked except when the water demand exceeds the supply therefore. See, In re Don Brown, Final Order, April 24, 1984; In re Monforton, Proposal for Decision, September 30, 1981, at 22-26, Final Order, March 1, 1982. While the Objector's point is a valid one, that is, it is possible that in fact the right evidenced by the Permit is not administrable, however, there is competent substantial evidence to support the Permit issuance. For this reason, the Order to issue the Permit must be affirmed. Similarly, competent evidence supports the finding of availability of water during spring runoff. (Hearing Exhibit 3). So, despite the uncertainty, those findings and Order based thereon are affirmed.



3. Period of Use

The period of use granted in the Proposal is not supported by the evidence. Evidence in the record establishes that there is little or no likelihood that the Permittee will ever be able to exercise his right in priority except in times of high runoff. Therefore, the Permit's period of diversion and use has been reduced to reflect usage only during the period of spring runoff, from April 1 - June 30. (See, in re Zinne; Proposal of September 7, 1984.) Availability of water in Big Coulee Creek for new appropriations has recently been administratively determined. In re Zinne Brothers and Minnie Zinne; In re Coulee Hill Ranch; In re Pitsch. In all cases it was found that Big Coulee is "water-starved." In re: Zinnes, Proposal Sept. 7, 1984, held that the flow of Big Coulee need increase dramatically in order for the Permittee to be entitled to exercise the permit right in priority, and that because of the chronic water scarcity, the rights reified in the Permit were, as a practical matter, of little economic value to the Permittee. Whether the Permittee, in these circumstances, chose to incur substantial financial costs in order to prepare for the wet year during which he would be entitled to divert, was not for the Department to consider.

At this later juncture, however, the Department cannot blind itself to the findings of lack of water availability in the hearing. Permits were granted in <u>Coulee Hill Ranch</u> and <u>Zinne</u>

which were admittedly of little value. How great could the chances be, then, for this Permittee, that he will ever be able to divert under the rights evidenced by the Permit?

Of course this matter of water availability and unappropriated water is a rather hard horse to curry. Some states take the position that permits may practically always issue, even though the recipient permittee may be entitled to divert only during the rare flood occurrence. In Montana, however, the Department is required to find and the Applicant required to prove by substantial credible evidence, availability of unappropriated water during the period of proposed use. While the burden of proof is not high, it was not met in this case

- Pitsch is not included as a depletive effect since the appropriator there provided for storage facilities, and would not, by his appropriation, deplete Big Coulee.
- The Colorado situation is distinguished from that in Montana because of the Colorado Constitutional provisions establishing that, "The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided. " added) Colo. Const. art. XVI, § 5; and, "The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Colo. Const. art XVI, §6. This is contrasted with the Montana Constitution wherein the waters of the state are declared, "All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law. " Mont. Const. art. IX, § 5, cl. (3) (emphasis added).

except for the period of spring runoff. See § 85-2-311(1), MCA (1983); Montana Power Company v. State ex. rel Carey, 41 St. Rep. 1233 (1984).

In the instant matter, the prior decisions were introduced into the record. The prior decisions constitute a <u>prima facie</u> proof regarding unappropriated waters and water availability.

Galiger v. McNulty, 80 Mont. 339, 260 Pac. 401, 403; Wills v. Morris, supra; Sherlock v. Greaves, 106 Mont. 206, 214 P.2d 87 (1937); Cook v. Hudson, 110 Mont. 263, 284, 103 P.2d 137, 147 (1940). All these cases demonstrate that the decisions were admissible and entitled to at least substantial credible, or <u>prima facie</u> evidentiary value.²

With regard to pre-Water Use Act case law defining finality for adjudication and the lack of binding effect of a judgment as against persons not parties to the prior action, it must be noted that the predicate for the due process implication was the possibility that a non-party could be bound, i.e., forced to act or restrained from acting, by virtue of a state court judgment in which he had no full and fair opportunity to participate. See, Stone, Are There Any Adjudicated Streams in Montana?, 19 Mont. L.

Although all of the reported cases admit decrees as prima facie evidence of the water rights of parties thereto, there is no logical reason why such decrees including specific findings of fact would not be admitted and duly considered as evidence of those facts.

CASE # 50642

Rev. 19 (1957). Here, however, the fundamental reality is that findings of fact have administratively been determined with regard to water availability in Big Coulee Creek. Those earlier findings are entitled to some weight.

As in Wills v. Morris, 100 Mont. 514, 523, 50 P.2d 862, 865 (1935); in the instant matter, the Department is not binding the Applicant to any of the findings made in the prior administrative decisions, but is merely admitting those findings as evidence on the issues of unappropriated water and water availability. The Applicant was not precluded from offering contradictory evidence on these issues, nor was the right of the Applicant herein to seek this Permit in any way precluded by the prior actions.

Wherefore, based on the foregoing, and being fully advised in the premises, the Administrator hereby makes the following:

ORDER

Subject to the conditions described below, the Application for Beneficial Water Use Permit is granted to Zinne Bros. to appropriate 720 gpm up to 90 acre-feet of water per year from Big Coulee Creek for irrigation on 60 acres more or less in SE¹4, Section 18, Township 5 North, Range 20 East, M.P.M., Golden Valley County, Montana. The period of use shall be April 1 to June 30 of each year. The priority date for this appropriation is April 14, 1982, 11:25 a.m.



The appropriation is further specifically subject to the following conditions:

- 1. This appropriation is subject to all prior water rights and to any final determination of rights as provided for by law. No diversion of water pursuant to this appropriation shall be undertaken except when there is sufficient water in the stream to permit the diversion without adverse effect upon prior appropriators.
- 2. No diversions shall be made after the Applicant has been informed or is otherwise aware that the flow rate in the Musselshell River at the USGS gauging station near Roundup, Montana, has dropped below the following amounts for the months indicated:

April 20.7 cubic feet per second (cfs)

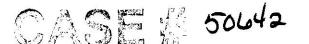
May 94.1 cfs

June 145.3 cfs

3. The Applicant shall measure all water diverted under this Permit and shall maintain current written records of all diversions indicating the date and amount of water used. These records shall be subject to inspection by the Department upon request.

DONE this ____ day of ______, 1985.

Gary Fritz, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
32 South Ewing Street
Helena, Montana 59620
(406)444-6605



NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

AFFIDAVIT OF SERVICE

STATE OF MONTANA)) ss. County of Lewis & Clark)
Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on Than 3, 1985, she deposited in the United States mail,
 Zinne Bros., c/o Alvin Zinne, Ryegate, MT 59074 Dept. of Natural Resources and Conservation, Steven Fry, 32 South Ewing, Helena, MT 59620 Harry Van Der Voort, Ryegate, MT 59074 Thomas Ast, Attorney, Box 685, Roundup, MT 59072 Roy W., Anita, & Dan J. Olson, Lavina, MT 59074 Sam Rodriquez, Water Rights Bureau Field Office Manager, Lewistown, MT (inter-departmental Mail) Gary Fritz, Administrator, Water Resource Division (hand deliver)
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION by
STATE OF MONTANA) ss. County of Lewis & Clark On this day of
IN WITNESS WHEREOF, I have hereunto set my hand and affixed my

Notary Public for the State of Montana Residing at Heleva, Montana My Commission expires 1-21-1587

10/15 E 1/2 50 W/2

written.

BEFORE THE MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

In the Matter of the Application for Beneficial Water Use Permit No. 50642-s40A by Zinnie Bros.

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hearing on this application was held on September 11, 1984, in Ryegate, Montana. The applicant was present through Mr. Alvin Zinnie. Objector Harry Van Der Voort was present and was represented by counsel. Objectors Roy and Dan Olson were present. The Engineering Bureau, DNRC, also an objector, was represented by Steve Fry. No means of recording or transcribing the testimony were provided but all parties agreed to conduct the hearing nonetheless. Witnesses were sworn and testified, exhibits were offered and received, and based thereon are the following:

FINDINGS OF FACT

- 1. The applicant proposes to divert water from Big Coulee Creek, a tributary of the Musselshell River, for irrigation of about 60 acres in the SE 1/4, Sec. 18, T. 5 N., R. 20 E., M.P.M. Water will be pumped from the stream to a sprinkler system for application on hay, grass and grain. This is a beneficial use of water.
- 2. The land in question is not currently irrigated and apparently has not been irrigated for many years. The applicants claim a filed appropriation dating from 1910 that covers this same land but they are unsure of its validity.
- 3. The period of water use applied for is April 1 through October 15, and the total amount requested is 90 acrefeet at a diversion rate of up to 720 gallons per minute.

CASE # 50642

4. Objectors Olson and Van Der Voort are located downstream from the applicants on Big Coulee and claim rights to use water for stock and irrigation purposes. Objector Engineering Division owns two irrigation projects--Deadman's Basin and Delphia-Melstone--which take and store water from the Musselshell River.

2

3

4

5

6

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

- 5. Big Coulee is a water-short stream. Most of its flow comes from precipitation and snow melt. As is common with this type of stream, there is usually a relative abundance of water in the spring (April, May, part of June), followed by a severe shortage of water in the summer. In rare years late summer precipitation will provide flows into the fall. All parties agree that as a practical matter there will almost never be surplus water to fulfill this application in July and August. Taking water in July and August would almost always interfere with senior rights.
- Accurate prediction of the available flows in Big Coulee is complicated by several factors. First, no water measurement records for Big Coulee have ever been maintained on a systematic basis, and there are no measuring devices in place. Second, there has been a flurry of appropriation activity on Big Coulee in the last few years. This has led to one permit having been granted and to several more having been recommended for approval. These all will use water in essentially the. same time period the present applicant--spring runoff. It has also led to litigation between objector Van Der Voort and others which resulted in a deeded right of 50 miners inches to Van Der Voort.

Even still, there appears to be in most years an excess of water available in Big Coulee during the spring runoff. Conversely, in most years the precipitous decline in Big Coulee flows during the summer due to user demand and the

decline of runoff creates a situation in which only rights senior to the present application can get water.

7. The Engineering Bureau, DNRC, after extensive investigation, has developed a schedule of minimum Musselshell River flows at the USGS Roundup gauging station that are necessary to fill its claimed prior rights for Deadman's Basin and Delphia-Melstone. Those flows are:

April	20.7	cubic	feet	per	second	(cfs)
May	94.1			575		
June	145.3	cfs				
July	227.3	cfs				
August	194.8	cfs				
September	94.5	cfs				
October	22.1	cfs				

The flow is read periodically, and is monitored closely during critical water periods. Current flow information can be obtained by telephone from the DNRC Field Office in Lewistown. The present application must be conditioned upon not taking water when the appropriator is aware or has been informed that the Musselshell River flow drops below the indicated levels.

8. Even though the water available to the applicant will generally be of short duration and less than the actual full requirement of his crops, the availability of some water will benefit the applicant with increased yields.

CONCLUSIONS OF LAW

- The Department has jurisdiction over this matter pursuant to section 85-2-301, MCA.
- 2. The applicant has a bona fide intent to appropriate water pursuant to a fixed and definite plan, and he is not attempting to speculate in the water resource. See Toohey v. Campbell, 24 Mont. 13, 60 P. 390 (1900); \$85-2-312, MCA.
- 3. The use of 720 gpm up to 90 acre feet per year is a reasonable estimate of the quantity of water required for the

applicant's purposes, and said amounts will be used beneficially. See Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912); Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939).

- The purpose of use herein is a beneficial one.
 \$85-2-102(2), MCA.
- 5. There are no unappropriated waters in July and August. There are periodically unappropriated waters available for the applicant's use at other times within the irrigation season, April 1 to October 15.
- 6. The applicant's use would adversely affect prior appropriators in July and August. The applicant's use will not adversely affect prior appropriators at any other time within the time of use proposed when there are excess waters in the stream.

PROPOSED ORDER

Subject to the conditions described below, the Application for Beneficial Water Use Permit is granted to Zinnie Bros. to appropriate 720 gpm up to 90 acre feet of water per year from Big Coulee Creek for irrigation on 60 acres more or less in SE 1/4, Sec. 18, T. 5 N., R. 20 E., M.P.M., Golden Valley County, Montana. The period of use shall be April 1 to October 15 of each year, excluding the months of July and August. The priority date for this appropriation is April 14, 1982, 11:25 a.m.

The appropriation is further specifically subject to the following conditions:

1. This appropriation is subject to all prior water rights and to any final determination of rights as provided for by law. No diversion of water pursuant to this appropriation shall be undertaken except when there is

sufficient water in the stream to permit the diversion without adverse effect upon prior appropriators.

2. No diversions shall be made after the applicant has been informed or is otherwise aware that the flow rate in the Musselshell River at the USGS gauging station near Roundup, Montana has dropped below the following amounts for the months indicated:

April May	20.3 87.2	cubic	feet	per	second	(cfs)
June	139.4			*		100
July	N/A					7
August	N/A		n ¹⁸			
September	90.5	cfs	1			
October	21.7	cfs ·	ě,		I +	1

3. The applicant shall measure all water diverted under this permit and shall maintain current written records of all diversions indicating the date and amount of water used. These records shall be subject to inspection by the Department upon request.

NOTICE

Exceptions or objections to this Proposal for Decision must be filed with Gary Fritz, Department of Natural Resources and Conservation, 32 South Ewing, Helena, Montana, no later than 20 days after service hereof.

DATED this 18th day of September, 1984.

> ALLEN B. CHRONISTER Hearing Examiner

AFFIDAVIT OF SERVICE

STATE OF MONTANA County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on deposited in the United States mail, Costified mail, an order by the Department on the Application by Zinne Bros., c/o Alvin Zinne, Application No. 50642-840A, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

Zinne Bros., c/o Alvin Zinne, Ryegate, MT 59074

Dept. of Natural Resources and Conservation, Steven Pry, 2. 32 South Ewing, Helena, MT 59620

Harry Van Der Voort, Ryegate, MT 59074

- Thomas Ast, Attorney, Box 685, Roundup, MT 59072 Roy W., ANita, & Dan J. Olson, Lavina, MT 59074 Sam Rodriquez, Water Rights Bureau Area Office Manager
- (inter-departmental mail)
- Allen Chronister, Hearing Examiner, Agency Legal Services, Justice Building, 215 N. Sanders, Helena, MT 59620

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

STATE OF MONTANA

88.

County of Lewis & Clark)

On this 3/st day of Souther, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above

written.

Notary Public for the State of Montana Residing at Heleuft, Montana My Commission expires 1.21-19